

1 MAYER BROWN LLP
LEE H. RUBIN (SBN 141331)
2 lrubin@mayerbrown.com
EDWARD D. JOHNSON (SBN 189475)
3 wjohnson@mayerbrown.com
DONALD M. FALK (SBN 150256)
4 dfalk@mayerbrown.com
ERIC B. EVANS (SBN 232476)
5 eevans@mayerbrown.com
ANNE M. SELIN (SBN 270634)
6 aselin@mayerbrown.com
Two Palo Alto Square, Suite 300
7 3000 El Camino Real
Palo Alto, CA 94306-2112
8 Telephone: (650) 331-2000
Facsimile: (650) 331-2061

9 *Attorneys for Defendant*
10 *Google Inc.*

11 [Additional Counsel on Signature Page]

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

15
16 IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS
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20
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Master Docket No. 11-CV-2509-LHK

**DEFENDANTS' JOINT RESPONSE TO
PLAINTIFFS' ADMINISTRATIVE
MOTION TO SEAL REGARDING
FILINGS RELATED TO PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
JOINT MOTIONS *IN LIMINE***

Pursuant to Local Rule 7-11 and 79-5, defendants Adobe Systems, Inc. (“Adobe”), Apple Inc. (“Apple”), Google Inc. (“Google”), Intel Corporation (“Intel”), and Intuit Inc. (“Intuit”) (collectively, “Defendants”) hereby jointly respond to Plaintiffs’ Administrative Motion to Seal Pursuant to Civil Local Rules 7-11 and 79-5(d) and (e) (ECF No. 879). Defendants hereby jointly move to seal redacted portions of Plaintiffs’ Opposition to Defendants’ Joint Motions *In Limine* (“Plaintiffs’ Opposition to Motions *In Limine*”), as well as the following exhibits to the Declaration of Anne B. Shaver In Support of Plaintiffs’ Opposition to Defendants’ Joint Motions *In Limine* (“Shaver Declaration Exhibits”):

- i. Shaver Declaration Exhibit 1 (proposed redacted version submitted herewith);
- ii. Shaver Declaration Exhibit 13 (November 25, 2013 Expert Report of Kevin Murphy) (proposed redacted version previously submitted at ECF No. 846);
- iii. Shaver Declaration Exhibit 14 (December 6, 2013 Expert Report of Edward Snyder) (proposed redacted version previously submitted at ECF No. 842);
- iv. Shaver Declaration Exhibit 15 (November 25, 2013 Expert Report of Eric Talley) (proposed redacted version previously submitted at ECF No. 842-2);
- v. Shaver Declaration Exhibit 17 (December 11, 2013 Reply Expert Report of Matthew Marx) (proposed redacted version previously submitted at ECF No. 832-2);
- vi. Shaver Declaration Exhibit 18 (October 28, 2013 Expert Report of Edward Leamer) (proposed redacted version previously submitted at ECF No. 856-8);
- vii. Shaver Declaration Exhibit 19 (December 11, 2013 Expert Report of Edward Leamer) (proposed redacted version previously submitted at ECF No. 856-10);
- viii. Shaver Declaration Exhibit 80 (proposed redacted version submitted herewith);
- ix. Shaver Declaration Exhibit 278 (proposed redacted version submitted herewith);
- x. Shaver Declaration Exhibit 279 (proposed redacted version submitted herewith);
- and
- xi. Shaver Declaration Exhibit 281A (proposed redacted version submitted herewith).

The redacted information has been designated Confidential or Attorneys' Eyes Only under the Stipulated Protective Order (Modified by the Court) (ECF No. 107). Defendants are concurrently filing declarations in support of the respective sealing requests and a proposed order listing each document sought to be sealed and the specific support for each request.

I. GOOD CAUSE EXISTS TO SEAL DEFENDANTS' CONFIDENTIAL INFORMATION IN PLAINTIFFS' OPPOSITION TO MOTIONS *IN LIMINE* AND THE SHAVER DECLARATION EXHIBITS

Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial court to permit sealing of court documents for, inter alia, the protection of "a trade secret or other confidential research, development, or commercial information." Fed. R. Civ. P. 26(c)(1)(G). The Ninth Circuit has "carved out an exception to the presumption of access to judicial records for a sealed discovery document [attached] to a nondispositive motion," where the requesting party shows good cause exists to keep the records under seal. *Navarro v. Eskanos & Adler*, No. C-06 02231, 2007 U.S. Dist. LEXIS 24864, at *6 (N.D. Cal. March 22, 2007) (citing *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) ("[A] 'particularized showing' under the 'good cause' standard of Rule 26(c) will 'suffice[] to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions.'"); *see also Pintos v. Pacific Creditors Assoc.*, 565 F.3d 1106, 1115 (9th Cir. 2009) ("In light of the weaker public interest in nondispositive materials, we apply the 'good cause' standard when parties wish to keep them under seal.")).

The redacted portions of the materials Defendants seek to seal contain highly confidential and commercially sensitive information about employee compensation, including Defendants' compensation data as well as information that reflects Defendants' internal business strategies related to compensation and internal assessments of their and other employers' competitive position in the labor market. Defendants also seek to keep under seal materials that reflect confidential hiring data, which reveal confidential recruiting and hiring strategies, practices, and policies. Defendants further seek to keep under seal information in business contracts which

1 reflect internal business strategies, policies, and practices. Finally, defendants seek to keep
2 under seal the personal identifying or private information of employees and third parties.
3 Defendants designated the foregoing information “Confidential” or “Attorneys Eyes Only” under
4 the Protective Order.

5 This Court has sealed substantially similar compensation and recruiting information in
6 this case, including in its recent sealing order dated March 14, 2014. *See* Order Granting in Part
7 and Denying in Part Motions to Seal dated March 14, 2014 (ECF No. 730); Order Granting in
8 Part and Denying in Part Motions to Seal dated September 30, 2013 (ECF No. 509). Moreover,
9 as each of the Defendants’ separately filed declarations demonstrate, Defendants kept the sealed
10 information confidential and the public disclosure of this information would cause each
11 Defendant harm by giving third-parties (including individuals responsible for competitive
12 decision-making) insights into confidential and sensitive aspects of each of the Defendants’
13 strategies, competitive positions, and business operations, allowing these third-parties to
14 potentially gain an unfair advantage in dealings with and against each of the Defendants.

15 A portion of the sealed information is employee compensation data. This type of
16 information is regularly sealed because of its confidential and private nature. *See Renfro v.*
17 *Unum*, No. 09-2661, 2010 BL 104197 (N.D. Cal. May 10, 2010) (granting a motion to seal
18 records containing plaintiffs’ salary information); *Nettles v. Farmers Ins. Exch.*, No. C06-5164,
19 2007 WL 858060, at *2, 2007 BL 247444 (W.D. Wash. Mar. 16, 2007) (holding that salary
20 review notices for third parties “who have not chosen to have their salary history placed into the
21 public record” could be sealed.); *EEOC v. Kokh, LLC*, No. CIV-07-1043, 2010 U.S. Dist. LEXIS
22 82526, at n.1, 2010 BL 187807 (W.D. Okla. Aug. 09, 2012) (noting that portions of summary
23 judgment materials were filed under seal because they contained “confidential salary
24 information.”).

25 Similarly, compensation policies, practices and decisions are routinely subject to a
26 sealing order. *In re Wells Fargo Loan Processor Overtime Pay Litigation*, No. C 07-01841, at
27 *16, 2008 U.S. Dist. LEXIS 53616, 2008 BL 123131 (N.D. Cal. June 09, 2008) (noting that a

1 “compensation policy” was filed under seal); *Hertz Equip. Rental Co. v. Useda*, No. CV-10-
 2 4953, 2010 BL 259718, at *2 (N.D. Cal. Nov. 02, 2010) (granting a temporary restraining order
 3 to enjoin a former employee from using a company’s “confidential and/or trade secret employee
 4 compensation information”).

5 In addition, good cause exists to seal confidential information relating to a company’s
 6 internal business, recruiting or hiring practices, strategies and policies, including confidential
 7 analyses of a company’s market position. *See* Fed. R. Civ. Proc. 26(c)(1)(G) (permitting sealing
 8 of “a trade secret or other confidential research, development, or commercial information”);
 9 *Krieger v. Atheros Commc’ns, Inc.*, Case No. 11-CV-00640, 2011 U.S. Dist. LEXIS 68033 at
 10 *3-4 (N.D. Cal. June 25, 2011) (holding that a company could seal a presentation from its
 11 investment adviser that contained “sensitive and confidential information, including long-term
 12 financial projections, discussions of business strategy, and competitive analyses”); *Network*
 13 *Appliance, Inc. v. Sun Microsystems Inc.*, Case No. C-07-06053, 2010 U.S. Dist. LEXIS 21721,
 14 at *9 (N.D. Cal. Mar. 10, 2010) (sealing “internal information regarding [defendant’s] business
 15 strategies and opportunities that were not widely distributed”); *see also TriQuint Semiconductor,*
 16 *Inc. v. Avago Techns. Ltd.*, Case No. CV 09-531, 2011 U.S. Dist. LEXIS 143942, at *9 (D. Ariz.
 17 Dec. 13, 2011) (granting motion to seal “market analysis information,” under “compelling”
 18 reason standard applicable to dispositive motions, including a “spreadsheet tracking information
 19 regarding potentially competitive products,” and other business strategy documents, such as
 20 information relating to “product competitiveness, and market and technological opportunities
 21 and risks”).

22 Moreover, the redacted information constitutes trade secrets, defined as “any formula,
 23 pattern, device or compilation of information which is used in one’s business, and which gives
 24 him an opportunity to obtain an advantage over competitors who do not know or use it.”
 25 *Samsung*, 727 F.3d at 1221-22. As evidenced by the accompanying declarations, the information
 26 Defendants seek to seal relate to Defendants’ internal business practices and strategies used in
 27 compensating, recruiting, and hiring employees, as well as the confidential terms of business

1 agreements. This falls plainly within the trade secrets definition. *Id.*; *see also In re Electronic*
 2 *Arts, Inc.*, 298 F. App'x. 568, 569-70 (9th Cir. 2008).

3 Good cause also exists for sealing the identities and personal contact information of
 4 specific employees or applicants that are contained in the Sealed Materials. These employees or
 5 applicants have not sought to make their identities known or placed in the public record. *Nettles*
 6 at *2 (holding that the interests of private parties outweighed the public's right of access with
 7 respect to information pertaining to third party salary and employment separation information).

8 **II. CONCLUSION**

9 For the foregoing reasons, Defendants respectfully request that this Court order the
 10 portions of Plaintiffs' Opposition to Motions *In Limine* and the Shaver Declaration Exhibits
 11 identified in each Defendant's declaration to be placed under seal. A proposed order granting
 12 Defendants' sealing requests is being filed concurrently herewith. With the exception of the
 13 Shaver Declaration Exhibits corresponding to expert reports (which were previously submitted to
 14 this Court in redacted form pursuant to prior sealing motions, as detailed above), Defendants are
 15 also concurrently filing on ECF sealed versions of the documents sought to be sealed with
 16 highlights indicating the proposed redactions and will submit Chambers Copies of the same.

17 Dated: April 21, 2014

MAYER BROWN LLP

19 By: /s/ Lee H. Rubin
 20 Lee H. Rubin

21 Lee H. Rubin
 22 Edward D. Johnson
 23 Donald M. Falk
 24 Two Palo Alto Square
 3000 El Camino Real, Suite 300
 Palo Alto, CA 94306-2112
 Telephone: (650) 331-2057
 Facsimile: (650) 331-4557

25 KEKER & VAN NEST LLP

27 By: /s/ Robert A. Van Nest

Robert A. Van Nest

Robert A. Van Nest
Daniel Purcell
Eugene M. Paige
Justina Sessions
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

Attorneys for Defendant GOOGLE INC.

Dated: April 21, 2014

O'MELVENY & MYERS LLP

By: /s/ Michael F. Tubach
Michael F. Tubach

George Riley
Michael F. Tubach
Christina J. Brown
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
Telephone: (415) 984-8700
Facsimile: (415) 984-8701

Attorneys for Defendant APPLE INC.

Dated: April 21, 2014

MUNGER, TOLLES & OLSON LLP

By: /s/ Gregory P. Stone
Gregory P. Stone

Gregory P. Stone
Bradley S. Phillips
Steven M. Perry
Gregory Sergi
355 South Grande Ave., 35th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

Attorneys for Defendant INTEL CORPORATION

1 Dated: April 21, 2014 JONES DAY

2
3 By: /s/ David C. Kiernan
4 David C. Kiernan

5 Robert A. Mittelstaedt
6 Lin W. Kahn
7 555 California Street, 26th Floor
8 San Francisco, CA 94104
9 Telephone: (415) 626-3939
10 Facsimile: (415) 875-5700

11 *Attorneys for Defendant ADOBE SYSTEMS, INC.*

12 Dated: April 21, 2014 JONES DAY

13 By: /s/ Robert A. Mittelstaedt
14 Robert A. Mittelstaedt

15 Craig E. Stewart
16 Roberta Tonelli
17 555 California Street, 26th Floor
18 San Francisco, CA 94104
19 Telephone: (415) 626-3939
20 Facsimile: (415) 875-5700

21 Catherine T. Broderick
22 1755 Embarcadero Road
23 Palo Alto, CA 94303
24 Telephone: (650) 739-3939
25 Facsimile: (650) 739-3900

26 *Attorneys for Defendant INTUIT INC.*

27 **ATTESTATION:** The filer attests that concurrence in the filing of this document has been
28 obtained from all signatories.